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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

ROBERT JOHN GIRARD II,

Plaintiff and Appellant,

v.

CHON GUTIERREZ, as Director, etc.,

Defendant and Respondent.

G032836

(Super. Ct. No. 03CC01007)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
William M. Monroe, Judge. Reversed and remanded with directions. Motion for
additional evidence. Denied as moot.

Law Offices of Ronald A. Jackson and Ronald A. Jackson for Plaintiff and
Appellant.

Bill Lockyer, Attorney General, Jacob Appelsmith, Assistant Attorney
General, Silvia M. Diaz and Thomas Scheerer, Deputy Attorneys General, for Defendant
and Respondent.

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INTRODUCTION

Newport Beach Police Officer D. Psaros arrested Robert John Girard II for driving under the influence of alcohol in violation of Vehicle Code section 23152. (All further statutory references are to the Vehicle Code unless otherwise specified.) Following an administrative per se hearing, the Department of Motor Vehicles (DMV) revoked Girard's driver's license for two years because Girard (1) refused to submit to a chemical test under section 13353 and (2) had suffered a prior conviction for driving under the influence in New Jersey within the previous seven years. Girard filed a petition for writ of administrative mandate seeking the reinstatement of his driving privileges. The trial court denied his petition.

On appeal, Girard argues there was insufficient evidence supporting a finding of probable cause to arrest him. He contends Psaros's unsworn arrest report should not have been considered and Psaros's sworn arrest report was factually inconsistent internally and with the unsworn report with respect to the time of the arrest. Girard also argues the trial court erred by failing to decide whether he had been previously convicted under a New Jersey law that is "substantially the same" as section 23152, within the meaning of section 13363, subdivision (b)—a determination necessary to support the two-year revocation of his driver's license.

Based on *MacDonald v. Gutierrez* (2004) 32 Cal.4th 150, 159, we conclude the trial court did not err by considering the contents of Psaros's unsworn report along with his sworn report. Further, although the trial court impliedly found the sworn report incorrectly stated the time Girard had been arrested, the court did not abuse its discretion by considering it otherwise trustworthy.

The trial court found Girard waived the issue whether he had been previously convicted under a New Jersey law that was substantially the same as section 23152. The court did so on the ground Girard first raised it in the traverse and not in his moving papers. But Girard did not waive this issue because he did raise it in the

memorandum of points and authorities filed with the petition as well as in the traverse. We therefore reverse and remand the matter to the trial court to hold a hearing to decide whether Girard's prior conviction was based on another state's law that is substantially the same as section 23152, within the meaning of section 13363, subdivision (b).

FACTUAL BACKGROUND

At 1:05 a.m. on August 3, 2002, Psaros observed Girard driving 67 miles per hour in a 35 miles per hour zone. Girard pulled into a Taco Bell and drove over a curb in the drive-through lane. As Psaros approached Girard's driver's side window, he was overwhelmed by the "odor of alcohol" emanating from inside the vehicle. Psaros asked for Girard's driver's license and, as they conversed, Psaros observed that Girard's speech was slurred. Psaros also smelled alcohol on Girard's breath. Psaros asked Girard to exit the vehicle and noticed he was "off balance and appeared confused." Girard admitted to Psaros he had consumed two beers. Because he had observed "objective symptoms of intoxication" (bloodshot, watery eyes; odor of alcohol; unsteady gait; and slurred speech), Psaros administered various field sobriety tests. Girard's performance on these tests was "very poor."

According to Psaros's unsworn arrest report (the unsworn report), Girard was arrested at 1:25 a.m. Psaros's sworn arrest report on the DMV DS 367 arrest form (the sworn report) noted the time of arrest as 1:05 a.m., even though the sworn report also stated Psaros first observed Girard driving at 1:05 a.m. Psaros asked Girard to take chemical breath and blood tests; Girard refused to take either test, stating he thought he had passed the field sobriety tests and wanted to read more about the law before he took any test. At 1:55 a.m., Psaros read Girard the chemical test admonition statement on the DS 367 form, stating the consequences of Girard's refusal to submit to a chemical test and informing Girard that refusal to take the test would cause his license to be suspended

or revoked. Girard requested, and was allowed, to read the admonition statement on his own. Girard again refused to take a chemical test.

ADMINISTRATIVE PROCEEDINGS

On January 31, 2003, an administrative hearing was conducted pursuant to section 13558, subdivision (a). The hearing officer admitted into evidence: (1) the sworn report, (2) the unsworn report, (3) the administrative per se suspension/revocation order and temporary driver's license served on Girard by Psaros, and (4) a copy of Girard's driving record. Girard objected to the sworn report on the grounds of "[l]ack of foundation, hearsay, insufficient probable cause, . . . Section 13380, Government Code [section] 11513 and *Manning v. [Department of Motor Vehicles]* (1998) 61 Cal.4th 273] . . ." and to the unsworn report on the grounds of "[l]ack of foundation, hearsay[,] . . . Section 13380 pursuant to *Solovij v. Gourley* [(2001) 87 Cal.App.4th 1229] and *Dibble v. Gourley* [(2002) 103 Cal.App.4th 496]." The hearing officer overruled his objections.

The hearing officer made the following findings: (1) Psaros had reasonable cause to believe Girard was driving under the influence of alcohol in violation of section 23152 based on objective symptoms of intoxication, the admission of alcohol consumption, and the unsatisfactory field sobriety tests results; (2) Girard was lawfully arrested for violation of section 23152 as a result of the reasonable cause determination and the subsequent findings of an arrest; (3) Girard "did refuse to submit to, or failed to complete any chemical test when requested to do so by the peace officer by answering 'No' when asked if he would take a breath or blood test"; and (4) Psaros advised Girard "of the chemical test admonition noted on the DS 367 form"

On April 1, 2003, the DMV issued the administrative per se notice of findings and decision (the decision) in which the DMV revoked Girard's driver's license from April 10, 2003 to April 10, 2005. This two-year revocation was based on section 13353, subdivision (a)(2). This revocation was imposed instead of a one-year suspension

under section 13353, subdivision (a)(1). Section 13353 permits such a revocation if a refusal to submit to a chemical test is within seven years of a prior conviction under another state law that is substantially the same as section 23152.

TRIAL COURT PROCEEDINGS

On April 30, 2003, Girard filed a petition for writ of mandate against the DMV Director, challenging the decision and asking the trial court to reinstate his driving privileges. The DMV filed an answer to the petition, and Girard filed a traverse. Following argument on July 29, 2003, the court issued a minute order denying Girard's petition, stating:

“The DMV hearing only considers four issues: 1) reasonable cause to believe; 2) whether person was placed under arrest; 3) whether person refused to take BAC [blood alcohol content]; 4) whether officer told person his driving privilege would be suspended if [he] refused to take BAC test.

“The DS-367 form was properly executed. It contains several facts in support of the officer[']s reasonable cause to arrest. Officer observed blood shot [*sic*] watery eyes, heavy odor of alcohol, unsteady gait and slurred speech. Form indicates that officer asked Girard to take blood, breath or urine test. The response was no to each. The form indicated that Girard was informed that refusal could cause license to be revoked or suspended.

“The DMV decisions are given strong presumption of correctness. Petitioner must show findings are contrary to weight [of] the evidence. *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817. The department need only receive a ‘record’ of conviction to take action. Here DMV record indicated a prior record of the suspension period under . . . [section] 13353[, subdivision] (a)(2). The additional time appears to be a mandatory requirement. Girard raises for the first time in the reply that the substance

of the [New Jersey] statute is not similar to that of the California statute. Girard raises the issue too late and failed to give DMV chance to respond.

“The Court’s tentative ruling is to deny petition o[f] Writ of Mandate in its entirety.

“The Court heard oral argument of counsel.

“The Court’s tentative ruling becomes the final ruling.”

STANDARDS OF REVIEW

The trial court exercises its “independent judgment” in the “judicial review of administrative decisions of the [DMV] which suspend a driver’s license” (*Berlinghieri v. Department of Motor Vehicles* (1983) 33 Cal.3d 392, 394.) “In exercising its independent judgment, a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence.” (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.)

“After the trial court has exercised its independent judgment upon the weight of the evidence, an appellate court need only review the record to determine whether the trial court’s findings are supported by substantial evidence.” (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143, fn. 10.) ““““In reviewing the evidence . . . all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.”””” (*Yakov v. Board of Medical Examiners* (1968) 68 Cal.2d 67, 72.)

DISCUSSION

I.

SUBSTANTIAL EVIDENCE SUPPORTED THE FINDING PSAROS HAD PROBABLE CAUSE TO ARREST GIRARD.

“Cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime.” (*People v. Price* (1991) 1 Cal.4th 324, 410.) Girard contends the trial court erred in denying his petition because “the Administrative Record failed to establish sufficient facts justifying [his] arrest” He claims: (1) the trial court improperly considered evidence in the unsworn report, and (2) the sworn report was factually inconsistent internally and with the unsworn report, and thus was untrustworthy. We address each of Girard’s arguments in turn.

A.

The Trial Court Properly Considered the Unsworn Report.

Girard claims the trial court improperly considered the unsworn report in determining whether Psaros had probable cause to arrest him. Citing *Solovij v. Gourley*, *supra*, 87 Cal.App.4th 1229, 1234, he argues an unsworn report may not be considered because a sworn report must contain all relevant evidence. In *MacDonald v. Gutierrez*, *supra*, 32 Cal.4th 150, 158-159, however, the California Supreme Court expressly disapproved of *Solovij v. Gourley*, stating:

“The conclusion reached by the Courts of Appeal in *Solovij* [*v. Gourley*], *supra*, 87 Cal.App.4th 1229, and *Dibble* [*v. Gourley*], *supra*, 103 Cal.App.4th 496—that the DMV may not consider an *unsworn* report by the *arresting* officer—is certainly arguable. However, given our conclusion in *Lake* [*v. Reed* (1997) 16 Cal.4th 448] that the DMV may consider an *unsworn* report by a *nonarresting* officer, it would be anomalous if it could not also consider an *unsworn* report by the *arresting* officer that is intended to supplement the officer’s sworn report. Again, in an administrative hearing,

‘[a]ny relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs’ [Citation.] ‘A police officer’s report, even if unsworn, constitutes “the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.”’ [Citation.] Again, too, we must not lose sight of the reason for the ‘slight relaxation of the rules of evidence applicable to an administrative per se review hearing,’ a rationale we reiterated in *Lake*: ‘[T]he administrative per se laws are intended to provide an efficient mechanism whereby those persons who drive after consuming dangerous amounts of alcohol can have their driver’s licenses quickly suspended so as to ensure they will not endanger the public by continuing to drive. [Citation.]’ [Citation.]

“To summarize: Section 13380 provides the arresting officer’s sworn report will contain ‘all information relevant to the enforcement action.’ Therefore, the Legislature clearly anticipates the sworn report will contain all or nearly all of the information necessary to remove the offender’s license. In light of this legislative intent, the sworn report cannot be wholly devoid of relevant information. However, so long as a sworn report is filed, it is consistent with the relaxed evidentiary standards of an administrative per se hearing that technical omissions of proof can be corrected by an unsworn report filed by the arresting officer. In this case, the arresting officer filed a sworn report.

“Accordingly, we affirm the judgment of the Court of Appeal, and we disapprove of *Solovij v. Gourley*, *supra*, 87 Cal.App.4th 1229, and *Dibble v. Gourley*, *supra*, 103 Cal.App.4th 496, insofar as they are inconsistent with the views expressed herein.”

Here, Psaros filed the sworn report. Thus, the trial court was allowed to consider the unsworn report to resolve the inconsistency in the sworn report regarding the time Girard was arrested. The sworn report stated Psaros (1) first observed Girard driving at 1:05 a.m., (2) arrested Girard at 1:05 a.m., but (3) did not observe objective

symptoms of intoxication until 1:10 a.m. The unsworn report explained Psaros first saw Girard driving at 1:05 a.m., observed objective signs of intoxication at 1:10 a.m., and did not arrest him until 1:25 a.m. The trial court therefore did not err by considering the unsworn report under these circumstances.

B.

The Trial Court Properly Relied on the Sworn Report.

Girard contends the trial court should not have relied on the sworn report because it was factually inconsistent internally and with the unsworn report, and thus was untrustworthy. Girard cites only the inconsistency that he was arrested at 1:05 a.m. before Psaros observed objective symptoms of intoxication at 1:10 a.m. Therefore, Girard argues his arrest at 1:05 a.m. was not supported by evidence of probable cause.

The trial court, we infer, in considering all of the evidence before it (including the unsworn report indicating the arrest at 1:25 a.m.), impliedly found the sworn report's arrest time of 1:05 a.m. was incorrect. As the trier of fact, the trial court was entitled to accept or reject any portions of the reports it found to be credible or incredible and to determine the chronology of events of August 3, 2002, based on the reports and other evidence admitted at the hearing. “Conflicts [in the evidence] . . . do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends.” (*Evje v. City Title Ins. Co.* (1953) 120 Cal.App.2d 488, 492.) The trial court found Psaros had probable cause to arrest Girard based on his observation of “blood shot [*sic*] watery eyes, heavy odor of alcohol, unsteady gait and slurred speech.” As discussed above, these findings were supported by substantial evidence contained in the sworn and unsworn reports.

II.

GIRARD DID NOT WAIVE THE ISSUE WHETHER HE HAD BEEN PREVIOUSLY CONVICTED UNDER ANOTHER STATE’S LAW THAT IS SUBSTANTIALLY THE SAME AS SECTION 23152.

Girard contends the trial court erred by failing to decide whether he had been previously convicted under a New Jersey law that is substantially the same as section 23152, within the meaning of section 13363, subdivision (b)—a determination necessary to support the two-year revocation of his driver’s license.¹ The trial court did not decide this issue based on its conclusion Girard had waived it by not raising it until he filed the traverse.

After Girard was served with the administrative per se suspension/revocation order and temporary driver license under section 13353, Girard requested a hearing under section 14100, challenging that order. “Whenever the department has given notice, or has taken or proposes to take action under Section . . . 13353 . . . , the person receiving the notice or subject to the action may, within 10 days, demand a hearing which shall be granted” (§ 14100, subd. (a).)

Section 13353, subdivision (a) states in part: “If any person refuses the officer’s request to submit to, or fails to complete, a chemical test or tests pursuant to Section 23612, upon receipt of the officer’s sworn statement that the officer had reasonable cause to believe the person had been driving a motor vehicle in violation of Section . . . 23152 . . . and that the person had refused to submit to, or did not complete, the test or tests after being requested by the officer, the department shall do one of the following: [¶] (1) Suspend the person’s privilege to operate a motor vehicle for a period

¹ Before the DMV may apply another state’s law to increase the revocation of a driver’s license to two years under section 13353, subdivision (a)(2), the DMV must be satisfied “that the law of such other place pertaining to the conviction is substantially the same as the law of this State pertaining to such conviction and that the description of the violation from which the conviction arose, is sufficient and that the interpretation and enforcement of such law are substantially the same in such other place as they are in this State.” (§ 13363, subd. (b).)

of one year. [¶] (2) Revoke the person’s privilege to operate a motor vehicle for a period of two years if the refusal occurred within seven years of . . . a separate violation of Section 23103 as specified in Section 23103.5, or of Section 23140, 23152, or 23153 . . . that resulted in a conviction.”²

Section 13558, subdivision (c)(1) provides that the only issues at a hearing on an order of suspension or revocation pursuant to section 13353 are “those facts listed in paragraph (1) of subdivision (b) of Section 13557.” Section 13557, subdivision (b)(1) provides: “If the department determines in the review of a determination made under Section 13353 or 13353.1, by a preponderance of the evidence, all of the following facts, the department shall sustain the order of suspension or revocation: [¶] (A) That the peace officer had reasonable cause to believe that the person had been driving a motor vehicle in violation of Section 23136, 23140, 23152, or 23153. [¶] (B) That the person was placed under arrest or, if the alleged violation was of Section 23136, that the person was lawfully detained. [¶] (C) That the person refused or failed to complete the chemical test or tests after being requested by a peace officer. [¶] (D) That . . . the person had been told that his or her privilege to operate a motor vehicle would be suspended or revoked if he or she refused to submit to, and complete, the required testing.” Therefore, in the context of a hearing on an order of suspension or revocation of a driver’s license under section 13353, the hearing officer may only decide the issues set forth in section 13557, subdivision (b)(1), and does not have the authority to decide whether the person had suffered a prior conviction that would trigger an enhancement of a suspension under section 13353, subdivision (a).

² Section 15023, subdivision (a) states in part, “The licensing authority in the home state, for the purposes of suspending, revoking, or limiting the license to operate a motor vehicle, shall give the same effect to the conduct reported . . . as it would if such conduct had occurred in the home state, in the case of a conviction for: [¶] . . . [¶] . . . Driving a motor vehicle while under the influence of intoxicating liquor”

Thus, Girard had no opportunity to address whether the appropriate penalty for his refusal to submit to a chemical test should be a one-year suspension or a two-year revocation of his driver's license until after the hearing officer rendered its decision following the administrative hearing.

Girard did challenge the basis of the DMV's order revoking his driver's license for two years in his petition for writ of mandate. In the memorandum of points and authorities filed with the petition, Girard argued the DMV's conclusion that he had been previously convicted in another state under a law substantially the same as section 23152 was unsupported. Girard contended, "Here, there was no showing that the sister state judgment on which the DMV relied to enhance the petitioner's period of suspension by an additional year was based on a statute similar to Vehicle Code section 2315[2]." In the answer to Girard's petition, the DMV responded to that argument, stating it had proven "the fact of the prior drunk driving infraction at the administrative hearing"

Although Girard developed that argument more fully in the traverse, he had already raised it in the moving papers. Therefore, the trial court erred by determining Girard had waived the argument by first raising it in the traverse. The trial court then erred by failing to decide whether the DMV properly relied on a prior conviction based on a law that was substantially the same as section 23152, within the meaning of section 13363, subdivision (b), to support the two-year revocation of Girard's driver's license. We therefore reverse and remand the matter to the trial court to decide this issue.

III.

MOTION FOR ADDITIONAL EVIDENCE

The Attorney General has filed an amended motion for the allowance of additional documentary evidence. In this motion, the Attorney General moves to have us consider additional evidence regarding Girard's driving record that was not admitted in the trial court. The motion explains Girard's prior driving under the influence conviction

occurred in Maryland, not in New Jersey. Because we reverse the judgment and remand the matter to the trial court to determine whether Girard's prior conviction was based on a law that was substantially the same as section 23152, within the meaning of section 13363, subdivision (b), the Attorney General's motion is denied as moot.

DISPOSITION

The judgment is reversed and the matter remanded to the trial court to hold a hearing to determine whether Girard's prior conviction was based on another state's law that was substantially the same as section 23152, within the meaning of section 13363, subdivision (b). On remand, the trial court may consider all relevant evidence presented by the parties. Appellant is to recover costs on appeal.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.